

**THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Appellants: Laborbe et al.
Appl. No.: 10/501,975
Conf. No.: 3409
Filed: July 15, 2004
Title: PREPARATION OF PRODUCTS HAVING ROASTED APPEARANCE
Art Unit: 1794
Examiner: Viren A. Thakur
Docket No.: 3714652-00491

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPELLANTS' REPLY BRIEF

Sir:

I. INTRODUCTION

Appellants submit Appellants' Reply Brief in response to the Examiner's Answer dated November 12, 2010 pursuant to 37 C.F.R. § 41.41(a). Appellants respectfully submit that the Examiner's Answer has failed to remedy the deficiencies with respect to the final Office Action dated April 16, 2010, as noted in Appellants' Appeal Brief filed on August 25, 2010, for at least the reasons set forth below. Accordingly, Appellants respectfully request that the rejections of pending Claims 10-11, 14, 16, 22-24 and 38-46 be reversed.

II. THE REJECTION OF CLAIMS 10-11, 14, 16, 23-24, 38-42 AND 44-46 UNDER 35 U.S.C. §103(A) IN VIEW OF PRASAD, DUPONT, HORROCKS, ARISS, PALMER, ITO, ZIEGLER, HAGEN, MIZUTANI AND IGOE SHOULD BE REVERSED BECAUSE THE EXAMINER HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF OBVIOUSNESS

Appellants respectfully request that the Board reverse the rejections of Claims 10-11, 14, 16, 23-24, 38-42 and 44-46 under 35 U.S.C. §103(a) because the Examiner has still failed to establish a *prima facie* case of obviousness with respect to the cited references.

In the Examiner's Answer, the Examiner attempts to rebut each and every assertion by Appellants by repeatedly attempting to justify the combination of the cited references. See, Examiner's Answer, pages 30-57. In response, however, Appellants respectfully submit that simply because the Examiner has cited a number of references that disclose some of presently claimed limitations, does not mean that the combination of the presently claimed limitations cannot be novel and nonobvious. Indeed, if it were proper for the Examiner to simply pick any claim element from any prior art reference to arrive at the present claims simply because the reference suggests the element, then every invention would effectively be rendered obvious.

As demonstrated in Appellants' Appeal Brief, the cited references are directed to entirely different food products utilizing varying ingredients for different intended purposes. For example, *Prasad* discloses a multi-functional marinade for fish and meat products that adds flavor to the fish or meat product. See, *Prasad*, page 3, lines 13-24. The marinade is added to fish and meat products that are fresh, frozen or thawed. See, *Prasad*, page 14, lines 16-20. There is no indication that the fish and meat products are processed or suitable for animals.

Dupont discloses processed animal food compositions prepared from a mixture of from 55% to 85% meat and meat by-product and from 10% to 25% cereal ingredients by weight. See, *Dupont*, Abstract and column 2, lines 42-52. As processed animal food compositions are distinguishable from unprocessed fish and meat products, the skilled artisan would have no reason to substitute the processed animal food compositions of *Dupont* for the fresh, frozen or thawed fish/meat products of *Prasad* in the absence of hindsight. *Dupont* discloses that the animal food compositions are stored with a sauce or a base in a container, which is distinguishable from a coating in accordance with the present claims.

Horrocks discloses a processed meat-like protein food having the appearance and chewing properties of natural muscle meat. See, *Horrocks*, column 1, lines 40-62. The meat-

like protein food is made by impregnating bundles of artificial protein fibers with an emulsion containing a heat coagulable binding agent such as gluten, albumen or starch, forming at least at the surface of the impregnated bundles, for example by coagulation, a protective layer resistant to cooking conditions, and compacting together a number of the bundles in an oriented arrangement, coagulating the binding agent and bonding the bundles together. As processed meat-like protein food is distinguishable from unprocessed fish and meat products, the skilled artisan would have no reason to substitute the processed meat-like protein food of *Horrocks* for the fresh, frozen or thawed fish/meat products of *Prasad* in the absence of hindsight.

Ariss discloses a gelled food product that mimics the appearance of a naturally occurring foodstuff. See, *Ariss*, page 1, lines 1-15. As the gelled food product of *Ariss* is specifically made to mimic naturally occurring foods such as meat or fish, *Ariss* teaches away for the gelled food product to have a roasted appearance.

Palmer discloses a food product comprising a core encased within a cover layer of substantial thickness. See, *Palmer*, column 1, lines 10-20. Although *Palmer* teaches using blood in its coating material, nowhere does *Palmer* disclose or suggest that the blood is used either as a coloring agent or in the claimed range. See, *Palmer*, column 7, lines 15-45. The portion of *Palmer* relied on by the Patent Office merely teaches that the coating may include coloring agents and, in a separate section, that the coating can include 1.6% by weight of beef blood, which is significantly below the level of 5% to 10% by weight required by Claim 10. See, *Palmer*, column 3, lines 38-42; column 7, line 35.

Ito discloses a method of producing roast meat products by adding a red color pigment to and dispersing throughout a block of raw meat. See, *Ito*, column 2, lines 17-32. The pigment has a discoloration temperature higher than the sterilization temperature of the meat product for a given heating time and the pigment losing its red color upon heating to the discoloration temperature or higher. The objective of using the red color pigment is to maintain the original color of the center of the cooked meat. See, *Ito*, column 2, lines 28-32.

Moreover, contrary to the Examiner's assertion, *Ito* does not disclose that the blood pigment causes the roasted appearance. Rather, *Ito* discloses that the blood pigment will denature when it reaches a certain temperature. *Ito* then states that the central portion of the meat block retains the original red color or in the so-called half-roasted state. See,

Ito, column 1, lines 15-25. The half-roasted term refers to the state of the meat and not the exterior appearance of the meat block due to the denaturing of the blood pigment.

Ziegler discloses a blood pigment preparation for meat products. See, *Ziegler*, column 1, lines 10-40. *Ziegler* fails to disclose an animal food piece including a coating having a roasted appearance after cooking or a need or use for the meat products to have a roasted appearance. Furthermore, *Ziegler* merely teaches incorporating whole blood in the meat itself to impart a desirable red color to the finished meat product, rather than using the blood as a colorant for coating the meat, which would lead the skilled artisan away from the present claims. *Id.*

Hagen discloses a composition of water-soluble food dye, edible fat and farinaceous material for coating good products prior to baking. See, *Hagen*, column 3, lines 60-67. *Hagen* fails to teach or suggest a need or use for the goods to have a roasted appearance due to blood and proteins in the coating, or that its baked products are animal food compositions or are processed or suitable for animals thereby providing the skilled artisan no reason to use *Hagen* to arrive at the present claims.

Mizutani discloses a raw food material that is covered with a material containing grain flour using a batter as a binder and baked. See, *Mizutani*, Abstract. Although *Mizutani* discloses that the batter can include sodium alginate, *Mizutani* discloses that the raw material is coated with the batter and further covered with bread crumbs or wheat flour and baked. *Mizutani* fails to teach or suggest any coatings for the raw food material for generating a roasted appearance due to pigment/colorants and proteins in the coating, or that its baked products are animal food compositions or are processed or suitable for animals thereby providing the skilled artisan no reason to use *Mizutani* to arrive at the present claims.

Igoe merely lists the definite of sodium alginate and its use as a binder, thickener or gelling agent. *Igoe* fails to teach or suggest that the sodium alginate can be used in coatings for generating a roasted appearance due to additional blood and proteins in the coating. As such, it is clear that the cited references are all directed to different food products utilizing varying ingredients for different intended purposes.

The Examiner states that "it is noted that one would not be modifying *Dupont-Delhovren* but rather would have been employing the coating taught by *Prasad* to provide a roasted appearance to the meat product taught by *Dupont-Delhovren*." See, Examiner's Answer, pages 35-36. Appellants disagree and submit that a combinations of references is exactly that – a

modification of a reference with an element or limitation from another reference. As the Federal Circuit notes, “the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be analyzed in isolation.” *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995). As such, simply because *Prasad* and *Dupont-Delhovren* disclose an element of the present claims, does not mean that those solitary elements may be plucked from the references and combined to arrive at the present claims. Instead, Appellants respectfully submit that the references must be viewed as a whole, and that since processed animal food compositions are distinguishable from unprocessed fish and meat products, the skilled artisan would have no reason to substitute the processed animal food compositions of *Dupont* for the fresh, frozen or thawed fish/meat products of *Prasad* in the absence of hindsight.

Further, the Federal Circuit has found that if the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there exists no reason for the skilled artisan to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984). This certainly applies here, where the primary reference is directed toward multi-component marinades for fish and meat products, and the secondary references are directed to a wide range of technologies including, for example, definitions of food ingredients (*Igoe*), baked goods (*Mizutani* and *Hagen*), and coating food products with meat (*Palmer*). As such, one skilled in the art would have no reason to combine the cited references to arrive at the present claims.

Appellants also respectfully submit that the sheer number of references (10) cited by the Examiner is evidence in and of itself that the invention is not obvious and most likely based solely on a hindsight reconstruction. As the Federal Circuit has noted, the requisite prior art suggestion to combine becomes less plausible when the necessary elements can only be found in a large number of references and “the extent to which such suggestion must be explicit in . . . the references, is decided on the facts of each case, in light of the prior art and its relationship to the applicant’s invention.” 2-5 Chisum on Patents §5.04 (quoting *In re Gorman*, 933 F.2d 982, 986-87; 18 U.S.P.Q.2d 1885, 1888 (Fed. Cir. 1991)).

Moreover, one should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075.

(Fed. Cir. 1988). Applicants further submit that the number of references, combined with their unrelated subject matter discussed above and the simple nature of the claims, demonstrates the presence of impermissible hindsight. The use of ten unrelated references, each cited for small, specific portions of the claims, shows an attempt to piece together the prior art to arrive at the invention. As such, Appellants respectfully submit that the skilled artisan would have no reason to combine the cited references to arrive at the present claims.

Appellants respectfully submit that what the Examiner has done here is to apply hindsight reasoning by attempting to selectively piece together teachings of each of the references in an attempt to recreate what the claimed invention discloses. Appellants also submit that if it were proper for the Examiner to simply pick any claim element from any prior art reference to arrive at the present claims simply because the reference suggests the element, then every invention would effectively be rendered obvious. Instead, the skilled artisan must have a reason to combine the cited references to arrive at the present claims. Appellants respectfully submit that such a reason is not present in the instant case.

For at least the reasons set forth above, Appellants respectfully submit that the cited references fail to disclose each and every element of the present claims and, as such, that the Examiner has failed to establish a *prima facie* case of obviousness.

Accordingly, Appellants respectfully request that the obviousness rejection of Claims 10-11, 14, 16, 23-24, 38-42 and 44-46 be reconsidered and withdrawn.

III. THE REJECTION OF CLAIMS 10, 14, 16, 23-24, 38, 40-42 AND 44-46 UNDER 35 U.S.C. §103(A) IN VIEW OF HORROCKS, ITO, DUPONT AND ZIEGLER AND FURTHER IN VIEW OF HAGEN AND MIZUTANI SHOULD BE REVERSED BECAUSE THE EXAMINER HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE OF OBVIOUSNESS

Appellants respectfully request that the Board reverse the rejections of Claims 10, 14, 16, 23-24, 38, 40-42 and 44-46 under 35 U.S.C. §103(a) because the Examiner has still failed to establish a *prima facie* case of obviousness with respect to the cited references for many of the same reasons established in Section II above.

For example, in the Examiner's Answer, the Examiner attempts to rebut each and every assertion by Appellants by repeatedly attempting to justify the combination of the cited references. See, Examiner's Answer, pages 30-57. In response, however, Appellants

respectfully submit that simply because the Examiner has cited a number of references that disclose a number of presently claimed limitations, does not mean that the combination of the presently claimed limitations cannot be novel and nonobvious. Indeed, if it were proper for the Examiner to simply pick any claim element from any prior art reference to arrive at the present claims simply because the reference suggests the element, then every invention would effectively be rendered obvious.

As demonstrated in Appellants' Appeal Brief, the cited references are directed to entirely different food products utilizing varying ingredients for different intended purposes. For example, *Horrocks* discloses a processed meat-like protein food having the appearance and chewing properties of natural muscle meat. See, *Horrocks*, column 1, lines 40-62. The meat-like protein food is made by impregnating bundles of artificial protein fibers with an emulsion containing a heat coagulable binding agent such as gluten, albumen or starch, forming at least at the surface of the impregnated bundles by coagulation, a protective layer resistant to cooking conditions, and compacting together a number of the bundles in an oriented arrangement, coagulating the binding agent and bonding the bundles together.

Dupont discloses processed animal food compositions prepared from a mixture of from 55% to 85% meat and meat by-product and from 10% to 25% cereal ingredients by weight. See, *Dupont*, Abstract and column 2, lines 42-52. *Dupont* is directed to an animal food composition completely distinguishable from the processed meat-like protein food having artificial protein fibers of *Horrocks*. *Dupont* fails to teach the need coatings for his animal food compositions or a need or use for the animal food composition to have a roasted appearance, which leads the skilled artisan away from the present claims. Instead, *Dupont* discloses that the animal food compositions are stored with a sauce or a base in a container, which is distinguishable from a coating in accordance with the present claims.

Ziegler discloses a blood pigment preparation for meat products. See, *Ziegler*, column 1, lines 10-40. *Ziegler* fails to disclose an animal food piece including a coating having a roasted appearance after cooking or a need or use for the meat products to have a roasted appearance. Furthermore, *Ziegler* merely teaches incorporating whole blood in the meat itself to impart a desirable red color to the finished meat product, rather than using the blood as a colorant for coating the meat, which would lead the skilled artisan away from the present claims. *Id.*

Hagen discloses a composition of water-soluble food dye, edible fat and farinaceous material for coating good products prior to baking. See, *Hagen*, column 3, lines 60-67. *Hagen* fails to teach or suggest a need or use for the goods to have a roasted appearance due to blood and proteins in the coating. *Hagen* further fails to disclose or suggest that its baked products are animal food compositions or are processed or suitable for animals thereby providing the skilled artisan no reason to use *Hagen* to arrive at the present claims.

Mizutani discloses a raw food material that is covered with a material containing grain flour using a batter as a binder and baked. See, *Mizutani*, Abstract. Although *Mizutani* discloses that the batter can include sodium alginate, *Mizutani* discloses that the raw material is coated with the batter and further covered with bread crumbs or wheat flour and baked. *Mizutani* fails to teach or suggest any coatings for the raw food material for generating a roasted appearance due to pigment/colorants and proteins in the coating. *Mizutani* further fails to disclose or suggest that its baked products are animal food compositions or are processed or suitable for animals thereby providing the skilled artisan no reason to use *Mizutani* to arrive at the present claims.

Further, the Federal Circuit has found that if the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there exists no reason for the skilled artisan to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984). This certainly applies here, where the primary reference is directed toward meat-like protein foods having the appearance and chewing properties of natural muscle meat, and the secondary references are directed to a wide range of technologies including, for example, definitions of food ingredients (*Igoe*), baked goods (*Mizutani* and *Hagen*), and animal food products (*Dupont*). As such, one skilled in the art would have no reason to combine the cited references to arrive at the present claims.

Appellants also respectfully submit that the sheer number of references (6) cited by the Examiner is evidence in and of itself that the invention is not obvious and most likely based solely on a hindsight reconstruction. As the Federal Circuit has noted, the requisite prior art suggestion to combine becomes less plausible when the necessary elements can only be found in a large number of references and “the extent to which such suggestion must be explicit in . . . the references, is decided on the facts of each case, in light of the prior art and its relationship to the applicant’s invention.” 2-5 Chisum on Patents §5.04 (quoting *In re Gorman*, 933 F.2d 982, 986-87; 18 U.S.P.Q.2d 1885, 1888 (Fed. Cir. 1991)).

Moreover, one should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075. (Fed. Cir. 1988). Appellants respectfully submit that the number of references, combined with their unrelated subject matter discussed above and the simple nature of the claims, demonstrates the presence of impermissible hindsight. The use of six unrelated references, each cited for small, specific portions of the claims, shows an attempt to piece together the prior art to arrive at the invention. As such, Appellants respectfully submit that the skilled artisan would have no reason to combine the cited references to arrive at the present claims.

Appellants respectfully submit that what the Examiner has done here is to apply hindsight reasoning by attempting to selectively piece together teachings of each of the references in an attempt to recreate what the claimed invention discloses. Appellants also submit that if it were proper for the Examiner to simply pick any claim element from any prior art reference to arrive at the present claims simply because the reference suggests the element, then every invention would effectively be rendered obvious. Instead, the skilled artisan must have a reason to combine the cited references to arrive at the present claims. Appellants respectfully submit that such a reason is not present in the instant case.

For at least the reasons set forth above, Appellants respectfully submit that the cited references fail to disclose each and every element of the present claims and, as such, that the Examiner has failed to establish a *prima facie* case of obviousness.

Accordingly, Appellants respectfully request that the obviousness rejection of Claims 10, 14, 16, 23-24, 38, 40-42 and 44-46 be reconsidered and withdrawn.

IV. CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the Examiner's Answer does not remedy the deficiencies noted in Appellants' Appeal Brief with respect to the final Office Action. Therefore, Appellants respectfully request that the Board of Appeals reverse the obviousness rejections with respect to Claims 10-11, 14, 16, 22-24 and 38-46.

No fee is due in connection with this Reply Brief. The Director is authorized to charge any fees that may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3714652-00491 on the account statement.

Respectfully submitted,

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